IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1499

JAMES BUSSE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JAMES BUSSE, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case of March 17, 1976.

CITATIONS TO OPINIONS BELOW

The district court's opinion denying petitioner's motion for a new trial is reprinted in Appendix A, *infra.* The judgment order of the Court of Appeals is not yet reported and is reprinted in Appendix B, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1976. A timely petition for rehearing en banc was filed and denied on March 17, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the petitioner was charged in an indictment with separate counts of unlawful wiretapping and disclosing the information he thereby obtained, does acquittal on the wiretapping count invalidate the verdicts of guilty on the disclosure counts?

2. Did the district court commit reversible error by refusing to charge the jury that, with regard to the alleged violations of 18 U.S.C. 2511(1)(c), the Government had the burden of proving that the petitioner knew or had reason to know that the information which he disclosed was obtained through the illegal interception of a wire or oral communication?

STATUTES INVOLVED

The statutory provisions involved, 18 U.S.C. 2511(1)(a) and (c) are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

The petitioner was indicted on one count of illegal wiretapping, in violation of 18 U.S.C. 2511(1)(a), and thirteen counts of disclosing the contents of wire communications which he knew or should have known had been obtained through an illegal wiretap, in violation of 18 U.S.C. 2511(1)(c).

On April 17, 1975, trial commenced before the Honorable Louis Rosenberg and a jury. The jury found the petitioner guilty of four (4) of the disclosure counts (Counts 2, 6, 11 and 13). He was acquitted of eight (8) of the remaining disclosure

counts and the one count of illegal wiretapping (Count 1). Prior to the submission of the case to the jury, the Court had directed a verdict of acquittal as to Count 10.

Petitioner thereafter filed a motion for a new trial which was subsequently argued and denied by the Court on September 3, 1975.

On September 18, 1975, on Count 2, petitioner was sentenced to five (5) years imprisonment, to be suspended after he had served thirty (30) days, after which he was to be placed on probation for the balance of the five (5) year period. Additionally, petitioner was to pay the costs and a fine in the amount of five hundred dollars ($500.00). Sentence as to the remaining counts was suspended.

It was the Government's theory that petitioner illegally wiretapped the telephone of Margaret Sue Geddie, made tape recordings of her conversations, and then unlawfully disclosed those conversations to thirtenn (13) individuals.

At trial, Miss Geddie testified that she had known petitioner for approximately three (3) years and had enjoyed a close business and social relationship with him (T-221). On July 14, 1974, petitioner phoned her and played a portion of a tape which she recognized as a conversation she had had (T-222). Petitioner said he had taped her phone conversations (T-225).

Although acquitted of wiretapping, petitioner was found guilty of illegally disclosing the contents of Miss Geddie's conversations to Sanford D. Sunday (Count 2), Eugene R. Sabina (Count 6), Peter Mays (Count 11), and Judd Sheppard (Count 14).

Eugene Sabina testified that, on July 15, 1974, petitioner played for him a five-minute segment of a tape recording of a phone conversation between Miss Geddie and a James Pisarcik (T-139). He further testified that petitioner told him he had

received that tape in the mail and didn't know where it came from (T-147).

Thomas E. Dorsey testified that petitioner paid him to deliver a large manilla envelope to Peter Mays (T-160-161). Peter Mays testified that he received the envelope from Dorsey on July 17, 1974, and that it contained a cassette tape (T-216). Mays played the tape the next morning and recognized Mr. Pisarcik's voice (T-217). Mays also stated that he had no idea who made the tape (T-219).

Judd Sheppard testified that sometime in July of 1974, petitioner visited him at his home (T-324). They went to petitioner's car where petitioner played approximately forty-five (45) seconds of a tape for him. Mr. Sheppard recognized one of the voices on the tape as that of Miss Geddie (T-325). Mr. Sheppard further testified that petitioner stated that he received the tape from someone, but he didn't know from whom (T-326).

Sanford D. Sunday testified that, on July 14, 1974, petitioner came to his office to do some work (T-332). As petitioner was getting up to leave, he said, "Just a minute, Bill. I would like you to hear something." (T-332). The petitioner then played approximately three (3) minutes of a tape. The witness recognized the voices of Miss Geddie and Mr. Pisarcik (T-333). Petitioner told the witness, "Well, it seems this cassette was sent to me by mail." (T-332-333).

Mr. Sunday and petitioner again met on July 29, 1974. At that time, referring to the tapes, petitioner stated, "This was not just a whim, but a well thought-out plan." (T-339). He further stated, "They won't find anything, not even fingerprints." (T-339).

None of the remaining witnesses who received tapes knew who sent them or who made them.

REASONS FOR GRANTING THE WRIT

1. Petitioner contends here, as he did in the District Court and in the Circuit Court, that the verdicts were inconsistent and that inconsistency of verdicts is a basis for reversal. In *Dunn* v. *United States*, 1932, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356, this Court held that inconsistent verdicts was not a basis for reversal. We urge this Court to re-examine *Dunn* in light of *Re Winship*, 1970, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d. 368, and *Ashe* v. *Swenson*, 1970, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed.2d. 469, and to overrule *Dunn*.

18 U.S.C. 2511(1)(c) provides:

> "(1) Except as otherwise specifically provided in this chapter, any person who - -
>
> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
>
> shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

Thus, under this section, one of the elements which the Government must prove is that petitioner knew or had reason to know that the information which he disclosed was obtained through the unlawful interception of a wire or oral communication. Innocent disclosure is not a crime.

A. WERE THE VERDICTS INCONSISTENT?

Margaret Sue Geddie testified that petitioner told her that he taped her phone conversations (T-225). Sanford D. Sunday testified that petitioner, referring to the tapes, stated:

> "This was not just a whim, but a well thought-out

> plan . . . They won't find anything, not even fingerprints." (T-339).

It was the Government's theory that petitioner illegally wiretapped Miss Geddie's telephone and that he, therefore, knew or had reason to know that the information he disclosed was obtained through the unlawful interception of a wire or oral communication.

In his opening statement to the jury, the Government prosecutor stated:

> "Now the Government will prove to your satisfaction and beyond a reasonable doubt that this defendant, James Busse, willfully intercepted telephone calls of Miss Sue Geddie by the use of an electronic device on July 10, 1974 . . . " (T-46).

In response to petitioner's motion for a directed verdict at the close of the Government's case, the prosecutor said:

> "The defendant knew or had reason to know (that there was an illegal wiretap) because he told Miss Geddie that he taped her telephone conversations and that the tapes themselves revealed the sound of the telephone ringing." (T-367).

Following through on this theme, the prosecutor told the jury in his closing argument:

> "The defendant stated to Miss Geddie he taped the telephone conversations and played a portion of the tape to prove it."

The common thread running through the respective counts of the indictment was the Government's theory that petitioner intercepted the telephone conversations in question. Thus, according to the Government, he was guilty of unlawful wiretapping and was likewise guilty of the disclosure because,

having done the wiretapping, petitioner knew or had reason to know that the information which he disclosed was obtained through the unlawful interception of a wire or oral communication.

The jury, however, by acquitting petitioner of the illegal wiretapping, rejected the Government's theory. Thus, there was implicit in the not-guilty verdict of wiretapping, a jury determination that petitioner did not intercept the telephone conversations in question. Since there was no other evidence bearing on the petitioner's knowledge, with respect to the disclosure counts, the verdict of not guilty on the wiretapping count was inconsistent with the verdicts of guilty on the disclosure count.

B. IS INCONSISTENCY OF VERDICTS A BASIS FOR REVERSAL?

The Third Circuit Court of Appeals, in *United States* v. *Vastine*, 363 F.2d. 853 (1966), held that on separate counts of a single indictment, a rational consistency in the verdict of a jury is not required. Said the Court:

> "Where different offenses are charged in separate counts of a single indictment, an acquittal of one or more of the counts does not invalidate a verdict of guilty on another even where the same evidence is offered in support of each count. (cit. om.)" Id. at 854.

The Court's decision was a recognition of the authority of *Dunn* v. *United States, supra.* The application of the principle of the *Dunn* case, reasoned the Court:

> " . . . precludes our speculating as to the possible reason for the inconsistent verdict in the instant case." 363 F.2d. at 855.

However, Judge Hastie, in his concurring opinion, expressed his hope that the rule of the *Dunn* case would soon be abandoned:

> "Recognizing the authority of *Dunn* v. *United States* (cit. om.), I consur in the affirmance of the conspiracy convictions despite their inconsistency with the simultaneous acquittals on the substantive counts. *However, in doing so, I express my opinion that an enlightened jurisprudence should not permit the jailing of accused persons on a record exhibiting verdicts in which a jury simultaneously says 'Yes' and 'No' in answer to a single critical question."* (Emphasis added) 363 F.2d. at 855.

While this Court has not yet taken an opportunity to reconsider the *Dunn* rule[1], several of its cases, decided since, indicate that it should be abandoned.

Expressions in many opinions of this Court indicated a long-held assumption that proof of a criminal charge beyond a reasonable doubt was Constitutionally required. However, it was not until *Re Winship, supra,* that this Court squarely held:

> "Lest there remain any doubt about the Constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

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[1]In *Hamling* v. *United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed.2d. 590 (1974), the jury was unable to reach a verdict on some counts and found the defendant guilty on others. The defendant argued that there was an inconsistency in the verdicts. The Court disagreed, finding no inconsistency. The Court, then, by way of dicta, stated that consistency in verdicts is not required.

The Court emphasized the vital role in our criminal procedure of the requirement of proof beyond a reasonable doubt:

> "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." 397 U.S. at 363, 364.

In 1970, in a double jeopardy context, in the case of *Ashe* v. *Swenson, supra,* this Court endorsed the concept of the rational jury. In *Ashe,* the Court was called upon to fashion the proper test to be employed when applying the rule of collateral estoppel to criminal cases. Said the Court:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charges, and other relevant matters, and conclude whether a rational jury could have rendered its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444.

It is clear that the rule announced in *United States* v. *Dunn, supra,* is at odds with the rational jury concept of *Ashe* v. *Swenson, supra.* Thus, assuming a rational jury, petitioner's acquittal of wiretapping mandates than an acquittal be entered on the disclosure counts. Only by endorsing the concept of the irrational jury[2] can this Court permit these inconsistent verdicts to stand.

Further, the inconsistent verdicts in the case are likewise at odds with this Court's holding in *Re Winship, supra,* that

proof beyond a reasonable doubt is a due process requirement. How can it be said that the Government met its burden in this case where the " . . . jury simultaneously (said) 'Yes' and 'No' in answer to a single critical question"? *United States* v. *Vastine, supra,* at 855 (concurring opinion of Judge Hastie).

Thus, we urge this Court, on the basis of *Re Winship* and *Ashe* v. *Swenson,* to abandon *Dunn* v. *United States* and reverse

2. It is well established that the Government bears the burden of proving every essential element of the offense charged. In fact, " . . . the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Re Winship, supra.* Accordingly, if the Government fails to prove an essential element, the petitioner is entitled to an acquittal.

Here, the Government had the burden of proving that petitioner knew or had reason to know that the information which he disclosed was obtained through the unlawful interception of a wire or oral communication. Accordingly, petitioner, in his additional points for charge, requested that the jury be instructed:

> "5. If you find that there is no evidence that James Busse knew or had reason to know that the contents of the communication was obtained through the interception of a wire or oral communication in violation of the Federal law, then you must acquit

---

2 In *Dunn, supra,* this Court, referring to the verdict then before it, said: "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiries into such matters." 284 U.S. at 394.

> James Busse of Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, the willful disclosure of any wire or oral communication.
>
> "6. To convict James Busse of the willful disclosure of any wire or oral communications, Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, you must find that James Busse knew or had reason to know that the information was obtained through the interception of a wire or oral communication in violation of the Federal law."

The Court denied these requests (T-374).

Nowhere in the Court's charge was the jury ever instructed that the Government had the burden of proving that the petitioner knew or had reason to know that the information which he disclosed was obtained through the unlawful interception of a wire or oral communication. Thus, the Court failed to instruct the jury with regard to an essential element of the offense.

In addition, the Court's instructions in this regard, when taken as a whole, were erroneous and misleading.

At one point, the jury was led to believe that petitioner was guilty if he intercepted telephone messages and disclosed them to others:

> " . . . that the evidence so produced by the Government was in two sections of an Act of Congress that the defendant intercepted telephone messages and that the defendant disclosed such intercepted personal conversations to others and therefore is guilty of violating the Act of Congress as to those two sections." (T-405).

At another point, the jury was led to believe that petitioner could be convicted if he merely disclosed the contents of the

conversations to the persons named in Counts 2 through 14:

> "It is for you, therefore, to examine all the evidence in this case and to determine whether or not the Government has proved to you beyond a reasonable doubt that the defendant was guilty of any or all of the charges contained in the indictment.
>
> * * *
>
> "As to Counts 2 to 14, with the exception of Count 10, did the Government prove to you beyond a reasonable doubt that the defendant disclosed the contents of the intercepted private converstaions between Miss Geddie and Mr. Pisarcik by distributing taped copies in cassette form to any or all or any of those persons as charged in Counts 2 to 14, inclusive, with the exception of Count 10." (T-406-407).

While the Court then read the appropriate statute to the jury, it never specified the essential elements which the Government bore the burden of proving:

> "As to all other counts, 2 to 14, inclusive, with the exception of Count 10, which you do not have before you, Congress enacted in the pertinent part of the statute the following: 'Any person who willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this statute." (T-407).

It is clear that the trial judge has a duty to instruct on the elements of the offense. *United States* v. *Industrial Laboratories Company*, 456 F.2d. 908 (10th Cir., 1972). In *Screws* v. *United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L.Ed. 1495 (1945), this Court held that plain error is committed when an essential element of the crime charged is not adequately presented to the jury.

It can hardly be said that the Court's reading of the statute isolated the essential elements or in any meaningful way conveyed to the jury what the Government had to prove.

The trial judge bears a particularly heavy responsibility to charge the jury correctly as to the essential elements of the offense, even in the absence of an objection or request by counsel. *Green* v. *United States*, 405 F.2d. 1368, 1970 (D.C. Cir., 1968). In *United States* v. *Musgrave*, 444 F.2d. 755, 764 (5th Cir., 1971), the Court said:

> "Just as an indictment which omits an essential element of the crime charged must be dismissed, as fatally defective, the trial judge's failure here to instruct the jury on all the essential elements of the crime in Counts 2 and 4, even though not requested, was plain error."

We recognize that trial counsel did not object to this alleged error at the conclusion of the Court's charge. We further recognize that, given the failure to object, this Court can take notice of the asserted error only if it constitutes plain error. F. R. Crim. P. 52 (b), *United States* v. *Heavlow*, 468 F.2d. 842 (3rd Cir., 1972).

We contend that the asserted error was plain error which affected the petitioner's substantial rights. In *United States* v. *Manos*, 340 F.2d. 534, 537 (3rd Cir., 1965), the Court defined plain error as follows: "The error must be such as would result in manifest miscarriage of justice or affect the fairness of judicial proceedings."

Failure to charge on an essential element of the offense comes within the definition of plain error. See also, *Screws* v. *United States*, *supra*, and *Green* v. *United States*, *supra*.

That the petitioner knew or had reason to know that the information which he disclosed was obtained through the illegal interception of a wire or oral communication was clearly an essential element of the crime charged. As such, the trial judge had a duty to instruct the jury that the Government had the burden of proving this element of the crime. Here, the trial judge's failure to so instruct the jury, even though specifically requested to do so, constituted reversible error.

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition, because inconsistent verdicts can no longer be sanctioned in view of this Court's recent pronouncements in *Re Winship, supra,* and *Ashe* v. *Swenson, supra.*

As to Point 2, the Court of Appeals has sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JAMES BUSSE, *Defendant*.

Crim. No. 74-352

United States District Court
W.D. Pennsylvania

Sept. 3, 1975

* * * * * * * * * *

OPINION

Rosenberg, District Judge.

The defendant James Busse moves for a new trial from his conviction on four counts of disclosing the contents of wire communications which he knew or should have known had been obtained through an illegal wiretap in violation of 18 U.S.C. 2511(1)(c). The defendant was acquitted of eight other counts of disclosure, the illegal wiretap, and Count Ten was dismissed by the court.

In support of his motion the defendant argues that the court erred in not granting the defendant's motion for a psychiatric evaluation to determine if the defendant was competent to stand trial; that the court erred in not reading verbatim a certain instruction to the jury requested by the defendant; that the court erred by injecting itself into the trial by indicating that the evidence included that "the wires were skillfully done, in that the wires were spread" and uncovered in the manner of a professional; that the jury rendered an inconsistent

verdict by acquitting the defendant of wiretapping and convicting him of disclosure; that 18 U.S.C. 2511(1)(a) and 2511(1)(c) are unconstitutionally vague; and other contentions, but essentially, that the verdict was against the weight of the evidence.

The defendant did not raise the issue of competency to stand trial until the day of trial. Pretrial, I conducted an extensive examination of the defendant to satisfy myself that the defendant was competant to stand trial as well as to comply with the mandates of the Supreme Court (T-3-39). In the questioning of the defendant I led him through various pathways of background, education, memory and recollection and found him to be intelligent, lucid and extremely preceptive. There was no mistaking that he was mentally competent as of the morning prior to trial. In the examination is contained a part of the colloquy:

"The Court: Well aside from your desire to understand the theories upon which it [the indictment] based, were you able to give factual information to your lawyer, any factual information that he might have asked for?

The Witness: Yes your Honor." (T-26).

"The Court: And after turning that over in your mind you would then be able to give him the information such as you believe he ought to have?

The Witness: Yes, your Honor." (T-31).

"The Court: Well, in any event, as the case now stands, you are factually aware of what you are being charged with?

The Witness: I have read the charge, your Honor.

The Court: You understand it.

The Witness: It is very clear, your Honor." (T-34).

The prevailing view is to determine if the defendant by reason of mental disease or disorder is unable at the time of plea or trial to understand the nature of the proceedings against him or to consult and cooperate with counsel in his defense. *Dusky* v. *United States*, 362 U.S. 402 (1960): *Pate* v. *Robinson*, 383 U.S. 375 (1966).

The defendant requested that I ask the following question verbatim: "Would you be prejudiced against a married man who has a love affair with another woman?" The question was asked of the prospective jurors, and therefore, the defendant's request was granted in substance. *Haith* v. *United States*, 231 F.Supp. 495 (E.D.Pa. 1964).

The defendant further contends that error was committed when I asked certain questions of a witness. The exchange occurred during the defense counsel's cross-examination of Mr. Morgan, an expert witness for the government: (T-115).

"(By defense counsel)
Q. Well, if the wires are exposed like that, can there be an interruption in the telephone service? In other words you wouldn't be able to hear too well or when you speak in the phone it may be garbled as a result of the wires becoming bare?

A. Not the way these wires were because they were spread apart and very carefully put that way, in my opinion so they wouldn't touch.

Q. What would happen if they touch?

A. The phone would go out of service.

"The Court: Then you are saying this was skillfully done?

The Witness: Yes. I would say so."

In my narrative to the jury at the close of the evidence I stated, " . . . the stripping or baring of the wire was not accidental but intentionally made because of the manner in which it was done . . . " (T-403). It is doubtful that this was error especially in light of my further instruction: (T-406)

> " . . . I have merely summarized the evidence and arguments of each side in an effort to clarify the issues. However, if I have in any way misstated any of the facts presented in evidence, you will disregard any statement of fact and rely completely upon your own recollection of what the evidence was as it was presented to you."

The defendant contends that the verdict was inconsistent in that the jury found the defendant guilty of disclosure and acquitted him of wiretapping. A verdict containing various counts need not be consistent. An acquittal on one count does not prevent conviction on another, even though the evidence is the same and the defendant could not have committed one crime without committing both, so long as the evidence is sufficient to support the count upon which convicted. *United States* v. *Heavlow*, 468 F.2d. 842, C.A. 3, 1972; *United States* v. *Vastine*, 363 F.2d. 853, C.A. 3, 1966; *United States* v. *Cindrich*, 241 F.2d. 853, C.A. 3, 1966; *United States* v. *Russo*, 335 F.2d. 299, C.A. 7, 1964.

The defendant's contention that 18 U.S.C. 2511(1)(a) and 2511(1)(c) are unconstitutionally vague is without merit. *United States* v. *Becker*, 334 F.Supp. 546 (D.C.N.Y., 1971). The defendant's remaining contentions may be summarized as relating to the verdict being against the weight of evidence. In determining the sufficiency of evidence to sustain a conviction, all of the evidence must be considered together to determine if there was support for the jury's verdict. *United States* v. *Galvin*, 394 F.2d. 228, C.A. 3, 1968; *United States* v. *Allord*, 240 F.2d. 840, C.A. 3, 1957. The verdict must be sustained if, taking the view most favorable to the government, there is substantial evidence to support it. *United States* v. *Kensil*, 195 F.Supp.

115 (E.D.Pa. 1961), aff'd. 295 F.2d. 489, C.A. 3, 1961, cert. den. *Haith* v. *United States*, 368 U.S. 967 (1962); *Jacobs* v. *United States*, 395 F.2d. 469 C.A. 8, 1968.

In the instant case the totality of the evidence clearly provided substantial evidence upon which the jury could base its verdict of guilty as to the four counts. Sue Geddie testified that the defendant told her that he had taped her telephone conversations (T-225). He also enumerated the names of several individuals he believed would be interested in hearing those tapes (T-225). Among those named were Sanford Sunday, Eugene Sabina and Judd Sheppard, all of whom were named in three of the four counts of disclosure which provided the basis for the defendant's conviction. Any further arguments raised disputed issues of fact which were resolved in the government's favor.

Accordingly, the defendant's motion for a new trial will be denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2067

JUDGMENT ORDER

(Filed February 4, 1976)

Hunter, III, *Circuit Judge*.

After considering the contentions raised by appellant, to wit, that the district court erred:

1. in refusing to rule that where the appellant was charged in an indictment with separate counts of unlawful wiretapping and with disclosing the information he thereby obtained, acquittal on the wiretapping count invalidates the verdicts of guilty on the disclosure counts;

2. in refusing to charge the jury that, with regard to the alleged violations of 18 U.S.C. 2511(1)(c), the government had the burden of proving that the appellant knew or had reason to know that the information which he disclosed was obtained through the illegal interception of a wire or oral communication; and

3. in refusing to grant a new trial on the ground that the government prosecutor, in his closing argument to the jury, improperly commented upon the appellant's failure to testify;

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Attest: *Clerk of the United States Court of Appeals for the Third Circuit*

APPENDIX C

Statutes Involved

18 U.S.C. 2511(1)(a) and (c):

> "(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> * * *
>
> "(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or"

No. 75-1499

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES BUSSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on February 4, 1976. The petition for a writ of certiorari was filed on April 14, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On March 5, 1976, petitioner filed in the court of appeals a "petition for rehearing *en banc*," which was denied on March 17, 1976. Although a timely petition for rehearing in the court of appeals suspends the finality of the judgment and therefore

QUESTIONS PRESENTED

1. Whether acquittal by the jury on a count charging petitioner with unlawful interception of communications automatically invalidates convictions on counts charging him with knowing and wilful disclosure of the illegally intercepted communications.

2. Whether the district court should have given a more explicit instruction concerning *scienter*.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of four counts of wilfully disclosing the contents of communications which he knew, or should have known, had been obtained through an unlawful wire interception, in violation of 18 U.S.C. 2511(1)(c). He was acquitted of one count of illegal wire interceptions, a violation of 18 U.S.C. 2511(1)(a).[2] Petitioner was fined $500 and sentenced on one count to five years' imprisonment, to be suspended in favor of probation after 30 days had been served. Sentence on the remaining three counts was suspended. The court of appeals affirmed without opinion.

The evidence established that petitioner played tapes of private telephone conversations between Margaret Sue Geddie and others to her business associates.

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tolls the time in which to seek certiorari, a suggestion of rehearing *en banc* "shall not affect the finality of the judgment of the court of appeals" (Fed. R. App. P. 35(c)) and therefore does not toll the time in which to seek certiorari. Cf. *Department of Banking* v. *Pink*, 317 U.S. 264, 266; *Market Street Ry.* v. *Railroad Commission*, 324 U.S. 548, 551-552.

[2]Petitioner also was acquitted of nine other counts of wilful disclosure.

In November 1973 Geddie terminated a close personal relationship which she had maintained with petitioner for about a year. Petitioner refused to accept her decision not to see him and threatened to force her to leave the city where she worked and lived (Tr. 221-222, 300). On July 14, 1974, petitioner telephoned Geddie and played for her a portion of a tape recording containing a conversation she had had a week earlier with a business associate (Tr. 222, 225, 227). Petitioner followed up this call with a series of telephone calls; when Geddie continued to hang up on him, petitioner told her that he had taped her telephone conversations. He said that he thought other people would be interested in hearing the tape; he named four such persons (Tr. 225-226).

Petitioner carried out his threat and played tapes of Geddie's private telephone conversations to three of her business associates and her employer (Pet. 3-4).[3] Each disclosure was the basis of a separate count of the indictment.

ARGUMENT

1. Petitioner contends that his convictions for disclosing the contents of the wire communications are inconsistent with his acquittal for intercepting the communications, and that the convictions therefore should be reversed.

Although it was the government's theory at trial that petitioner personally had intercepted the conversations,

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[3]Nine other people received tapes; none could testify who had made or sent them.

its evidence that he had done so was not compelling;[4] the jury's verdict that the government had not proven beyond a reasonable doubt that petitioner intercepted the conversations is not inconsistent with its verdict that petitioner had disclosed the conversations knowing that they had been illegally intercepted.

In any event, even if the verdicts were inconsistent, that would not affect the validity of petitioner's convictions. *Dunn* v. *United States*, 284 U.S. 390, 393-394; *Hamling* v. *United States*, 418 U.S. 87, 101.[5]

2. Petitioner contends that the trial court should have instructed the jury more specifically that the government had to prove beyond a reasonable doubt that petitioner knew or had reason to know that the conversations had been obtained through illegal wiretapping (Pet. 10-14). However, read as a whole (*United States* v. *Park*, 421 U.S. 658, 674), the instructions adequately informed the jury of the burden of proof.

The court instructed the jury that the government must prove "every essential element of * * * guilt beyond a reasonable doubt" (Tr. 396). It read Count 2 of the indictment (which, it explained, was the same as Counts 3 through 14 except as to the party to whom the disclosures had been made) which charged (Tr. 400; emphasis added):

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[4]Petitioner told Geddie he had taped the conversations, not that he personally had wiretapped her telephone line (Tr. 225-226).

[5]Petitioner's argument (Pet. 8-10) that *In re Winship*, 397 U.S. 358, and *Ashe* v. *Swenson*, 397 U.S. 436, undercut *Dunn* is fallacious. The rationale for the rule permitting inconsistent verdicts is not that jurors are irrational, but that they may convict on some counts but not others because of compassion or compromise. The Court recognized this in *Hamling*, which was decided after *Winship* and *Ashe*.

> the defendant * * * willfully did disclose and endeavor to disclose to Sanford Sunday, the contents of wire communications, which contents had been obtained through the interception of wire communications in violation of Title 18 of the Code, * * * *as the defendant * * * then knew and had reason to know* * * *.

A copy of the indictment, which repeated in each count this language on *scienter*, was used by the jury in its deliberations (Tr. 422). The court also read to the jury the applicable statute (Tr. 407; emphasis added):

> Any person who willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication *knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection shall be guilty* * * *.

The jury was further instructed (Tr. 411):

> As for the first element that interception and disclosure must be willful as is charged in the indictment, an act is done willfully if done voluntarily and intentionally and with a specific intent to do something that the law forbids.

The court stressed that the jury had to find specific intent to violate the law. In addition, both defense counsel (Tr. 382) and the prosecutor (Tr. 389) discussed with the jury the question whether the evidence demonstrated petitioner's knowledge that the conversations had been obtained and disclosed in violation of federal law. There is no reason to believe that the jurors did not understand that petitioner was guilty only if he disclosed the communications "knowing or having reason to know" that they had been obtained in violation of law.[6] See *United*

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[6]The sufficiency of the evidence of petitioner's knowledge is not challenged.

States v. *Billingsley*, 474 F.2d 63, 65 (C.A. 6); *United States* v. *Malfi*, 264 F.2d 147, 151 (C.A. 3).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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